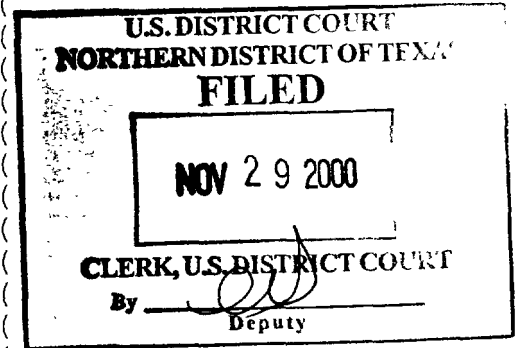


IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

STEPHEN B. JONES, LINDA D. ( CIVIL ACTION NUMBER  
LYDIA and CAROLINE FRANCO, (   
as Texas registered voters, (

VERSUS ( 3:00-CV-2543-D  
(

GOVERNOR GEORGE W. BUSH (   
AND RICHARD B. CHENEY, (   
as candidates for President and (   
Vice-President of the United (   
States of America; and ERNEST (   
ANGELO, GAYLE WEST, BETTY R. (   
HINES, JAMES B. RANDALL, HELEN (   
QUIRAM, HENRY W. TEICH, JR., (   
WILLIAM EARL JUETT, HALLY B. (   
CLEMENTS, HOWARD PEBLEY, JR., (   
ADAIR MARGO, TOM F. WARD, JR., (   
CARMEN P. CASTILLO, CHUCK JONES, (   
MICHAEL PADDIE, JAMES DAVIDSON (   
WALKER, JOSEPH I. O'NEIL, III, (   
BETSY LAKE, ROBERT J. PEDEN, (   
JIM HAMLIN, MARY E. COWART, (   
SUE DANIEL, JAMES R. BATSELL, (   
LOYCE MCCARTER, MICHAEL DUGAS (   
NEAL J. KATZ, MARY CEVERHA, (   
CLYDE MOODY SIEBMAN, RANDALL TYE (   
THOMAS CRUZ G. HERNANDEZ, JOHN (   
ABNEY CULBERSON, STAN STANART (   
and KEN CLARK, Texas Electors ( November 27th, 2000



TRANSCRIPT OF TELEPHONIC SCHEDULING CONFERENCE  
BEFORE THE HONORABLE SIDNEY A. FITZWATER,  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: WILLIAM K. BERENSON, P.C.  
1701 River Run, Suite 900  
Fort Worth, Texas, 67107  
817-885-8000  
JAMES JONES  
Jones & Associates  
5015 Tracy #100  
Dallas, Texas 75205  
214/219-3456

PAMELA J. WILSON, C.S.R., U.S. DISTRICT COURT

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1 For the Defendant:

HARRIET E. MIERS and  
EVAN E. FITZMAURICE  
Locke Liddell & Sapp, L.L.P.  
2200 Ross Avenue, Suite 2200  
Dallas, Texas 75201-6776  
214/740-8000

5 ROBIN P. HARTMANN and  
STACY L. BRAININ  
Haynes & Boone L.L.P.  
3100 NationsBank Plaza  
Dallas, Texas 75202  
214/651-5000

9 DAVID AUFHAUSER  
Williams & Connolly  
725 12th Street N.W.  
Washington, D.C. 20005  
202/434-5049

12 ANDY TAYLOR  
First Assistant Attorney General  
BRENT BENOIT  
Special Assistant Attorney General  
State of Texas  
209 W. 14th, 8th floor  
Austin, Texas 78701  
512/936-1888

22 Court Reporter:

PAMELA J. WILSON, CSR  
1100 Commerce, Room 15A3  
Dallas, Texas 75242  
214/415-1884

1                                    P R O C E E D I N G S:

2                    THE COURT: This is Judge Fitzwater speaking.

3                    Is Mr. Berenson there?

4                    MR. BERENSON: Yes.

5                    THE COURT: Ms. Miers?

6                    MS. MIERS: Yes, I'm here, judge.

7                    THE COURT: And Mr. McNeil?

8                    MR. HARTMANN: Rob Hartmann, Stacy Brainin for  
9 Haynes and Boone.

10                   THE COURT: And Mr. Taylor or Mr. Benoit?

11                   MR. TAYLOR: We're both here, Your Honor.

12                   THE COURT: All right. I have in my presence here  
13 the court reporter and my law clerks, and I have you on my  
14 speakerphone. To assist the court reporter, if you would  
15 please state your name before you speak, so that she will  
16 have a clear record of who it is who is presenting argument  
17 or asking questions.

18                   And if you will please, try not to talk over each  
19 other. And I will make certain that I give everyone an  
20 opportunity to speak. And if I inadvertently forget someone  
21 on a particular point, you can then ask to be heard, because  
22 it's not my intention to overlook anyone.

23                   I'm going to assume that we don't lose a connection  
24 with any attorney, but if something happens, please let me  
25 know.

1           The purpose for convening this conference is primarily  
2 for scheduling. And I have in mind in talking about  
3 scheduling three primary matters. There may be others.

4           One is the matter of briefing the motions to dismiss  
5 that were filed today.

6           The second is the matter of submitting materials and  
7 briefs on the preliminary injunction application.

8           And the third is what, if any, expedited discovery  
9 should be permitted and how should it be conducted.

10          I have in mind a possible plan that could bring this  
11 matter to a decision on Friday, December 1st, which would  
12 allow one side or the other to appeal at that point.

13          But before I give those thoughts, I will be glad to  
14 hear first from Mr. Berenson and then I'll hear from  
15 opposing counsel.

16          Mr. Berenson.

17               MR. BERENSON: Thank you, Your Honor.

18          I would like to introduce to the court and all parties  
19 Mr. James Jones who I'm going to -- he's going to be filing  
20 a notice of appearance as lead counsel, Your Honor. So I  
21 would like to actually turn this over to him.

22               THE COURT: Mr. Jones.

23               MR. JONES: Your Honor, as Mr. Berenson said, I'll  
24 be filing an appearance as lead counsel in this case.

25          Also filing an appearance in this case will be Mr.

1 Charles McGarry, who is the former chief justice of the  
2 Fifth District Court of Appeals, and Professor Levinson from  
3 the University of Texas, constitutional law scholar.

4 THE COURT: All right. Fine.

5 MR. JONES: And since I'm coming, you know, late  
6 to this party, I've just recently had an opportunity to  
7 review everything that has been filed. And in looking at  
8 this, my thought was in terms of expedited discovery that  
9 the most expeditious way of getting the evidence that we  
10 would need to get to be able to present the court with a  
11 full record on the briefing, would be the deposition of Mr.  
12 Cheney and his wife, which I think we could complete in a  
13 single day, going half a day with each.

14 And, you know, we could do those here in Dallas, we  
15 could do those in D.C. That doesn't particularly matter to  
16 me.

17 We would, of course, like to get those done as soon as  
18 possible, so that we could get our motion for preliminary  
19 injunction filed no later than Monday of next week, the  
20 4th.

21 THE COURT: And, Mr. Jones, what discovery do you  
22 contemplate needing?

23 MR. JONES: Again, a -- the depositions of Mr.  
24 Cheney and his wife, along with a duces tecum.

25 THE COURT: Let me be more specific. I'm sorry.

1 MR. JONES: Okay.

2 THE COURT: What types of questions do you intend  
3 to ask of the witnesses?

4 MR. JONES: Well, certainly, if -- if you look at  
5 all the items contained within the complaint, everything --  
6 just go down that list, everything along those lines about  
7 the listing of the residence in Highland Park for sale,  
8 where that stands, you know, whether that's a genuine  
9 attempt to sell or simple a sham.

10 The circumstances surrounding the switching of the --  
11 of the voter registration.

12 And we have some indication there may have been some  
13 switch in driver's license and/or auto registrations. And  
14 so information regarding that.

15 Information, you know, regarding, for example, if the  
16 registration were switched where those -- where those  
17 automobiles were located at. And a whole -- a whole list  
18 of -- of issues that would go to the state in which Mr.  
19 Cheney is an inhabitant.

20 THE COURT: The reason I'm asking is the  
21 defendants in their response have cited the court to  
22 cases -- one Fifth Circuit case in fact that I wrote, in re:  
23 FDIC, concerning the discretion of a court to order a  
24 high-level public official to appear for a deposition.

25 It appears to me -- and they suggest -- although they

1 oppose discovery in light of their motions to dismiss --  
2 they suggest interrogatories.

3 And my thought would be that I could allow you a  
4 certain number of interrogatories. And, again, I have not  
5 heard from the defendants yet. But if I were to allow you a  
6 certain number of interrogatories and expedite the response  
7 date, why those would be an unacceptable substitute?

8 MR. JONES: Well, in that case, Your Honor,  
9 certainly if -- if we're going to be limited to the  
10 interrogatories, without the chance to follow-up on those in  
11 depositions, we would -- we would want greater than the 25  
12 allowed by the local rules, of course. And I think if  
13 combined with request for production, that would give us  
14 documentary evidence that we need, then -- again, deposition  
15 would be my first choice, but that would be an acceptable  
16 second choice.

17 THE COURT: Before I hear from defense counsel,  
18 the reason I am pursuing that, in part, is because it  
19 appears that the plaintiffs have evidence already that they  
20 believe establishes the basis for their claims. And I'm  
21 wondering what it is in fact that you need, in addition to  
22 what you already apparently have because of the allegations  
23 of your pleadings.

24 MR. JONES: Well, Your Honor, the allegations in  
25 pleadings and admissible evidence are two different things.

1 And while we had a good faith -- we -- I believe Mr.  
2 Berenson had a good faith belief in the allegations that he  
3 put in the complaint, you know, which came from various  
4 sources, getting that information in the form of admissible  
5 evidence is what discovery is for.

6 THE COURT: Well, before I hear from the  
7 defendants, you sought a temporary restraining order and you  
8 must have had evidence that you felt warranted a temporary  
9 restraining order.

10 MR. JONES: Well, I have a hard time answering  
11 that one, Your Honor, because I didn't request the temporary  
12 restraining order.

13 THE COURT: That's fine. Fair enough, Mr. Jones.  
14 All right. Ms. Miers.

15 MS. MIERS: On behalf of Governor Bush -- judge, I  
16 am accompanied by Evan Fitzmaurice of our office also, for  
17 the record.

18 We would urge the court to consider the merits of the  
19 motions to dismiss, because we believe that those are  
20 dispositive of this case and that when ruled upon the need  
21 for any discovery whatsoever would not exist.

22 So with respect to the court's question in terms of  
23 schedule, which addressed first the schedule for responding  
24 to the motions, we think that that is the appropriate focus  
25 and that once the motions are briefed and ruled upon that we



1 feel strongly that there will be no need for discovery,  
2 because the court lacks subject matter jurisdiction and  
3 dismissal is appropriate.

4 THE COURT: Ms. Miers, what I have in mind -- and  
5 this will help other counsel in focusing on what I'm looking  
6 at. I'm looking at the potential need to address both the  
7 motion to dismiss and the merits in tandem, so that in the  
8 event of an appeal the appellate court has everything before  
9 it. Thus, even if the court -- assume arguendo the court  
10 granted the motion to dismiss but the appellate court  
11 reversed, it would not be back here before me on a very  
12 short time frame.

13 What is your position on the possibility of going  
14 forward with the merits, understanding that it is the  
15 court's intent to give full attention to your motion to  
16 dismiss?

17 MS. MIERS: Your Honor, I believe other counsel  
18 will have comment about that issue also, because there are a  
19 number of named defendants that are not before the court at  
20 the present time. So any kind of hearing on the merits is  
21 an issue that will need to be discussed.

22 THE COURT: Ms. Miers, when I said merits, I did  
23 not mean a trial as in a final trial on the merits. I meant  
24 merits only in terms of a preliminary injunction.

25 MS. MIERS: Okay. Thank you, Your Honor.

1           I think -- I think with respect to the injunctive  
2 matter, we still feel that the motions are dispositive and  
3 consideration of the motions are sufficient to dispose of  
4 the matter based on the plaintiffs' pleadings.

5           THE COURT: All right. Thank you.

6           Mr. Hartmann.

7           MR. HARTMANN: Yes, Your Honor. Ron Hartmann for  
8 Secretary Cheney.

9           It is our view, Your Honor, that there is no discovery  
10 that would at all advance the issues that are raised in the  
11 papers which we put before you. We just don't believe,  
12 based upon a reading of the Constitution or a reading -- you  
13 know, the standing issues and the political questions issues  
14 that we've raised, that there is any discovery at all that  
15 is implicated.

16           I think that we would have a sufficient record before  
17 the court based upon these pleadings that we've filed with  
18 the court.

19           David, is there something you would like to add to  
20 that?

21           MR. AUFHAUSER: My name is David Aufhauser. I'm  
22 with the firm of Williams and Connolly from Washington, and  
23 with the permission of the court will be on behalf of Mr.  
24 Cheney.

25           THE COURT: That's fine, counsel.

1 I don't believe we have your name on a pleading. Will  
2 you mind spelling it for the court reporter?

3 MR. AUFHAUSER: Of course. I've been asked that  
4 millions of times. A-U-F-H-A-U-S-E-R, David Aufhauser.

5 THE COURT: All right. Thank you, counsel.

6 You may proceed.

7 MR. AUFHAUSER: Forgive me if I repeat just a few  
8 points that co-counsel have made. But it's worth stating  
9 again.

10 We believe that the scholarship and the pleadings  
11 before the court will demonstrate to the court convincingly  
12 that this is really a nonjusticiable controversy and that it  
13 is properly not before the court. If anything, if there is  
14 a controversy or contest over what constitutes definition of  
15 inhabitancy on December 18th, it's a matter that is  
16 committed quite properly to the houses of Congress and to  
17 the electoral college.

18 Having said that, trying to address your specific  
19 question about whether you can reach the merits, I guess I  
20 have two responses initially.

21 One is, a great many of the alleged facts are matters  
22 public record already, so I truly don't believe that there  
23 is necessity for further discovery.

24 Just as importantly, second, it is our firm conviction  
25 that the -- if you are to look at the question of

1 inhabitaney, that the dispositive date for answering that  
2 question is the date when the electoral college meets and  
3 votes, which is December 18th.

4       So if we are correct, and if the court agrees with us,  
5 you cannot reach a merits decision whether someone is an  
6 inhabitant before the 18th, of Texas or Wyoming, all of  
7 which goes to underscore the very thrust of our pleadings  
8 filed with the court again. Which, again, this is a  
9 nonjusticiable controversy, generalized grievance submitted  
10 and championed by the citizens. And it's one which  
11 respectively is not committed for resolution to an Article  
12 III court but rather, if it's a true controversy, recognized  
13 as such, to the contest of the electoral college vote in the  
14 house of representatives.

15       So for those reasons, I -- I truly don't believe  
16 further discovery is necessary.

17       Of course, my fallback position is I think that the  
18 court has judicially suggested that if there is to be any  
19 discovery it should be the least intrusive kind, which would  
20 be a limited number of written interrogatories. But, again,  
21 we think -- I think we will be intruding upon the court's  
22 time unnecessarily with any such pleadings and any such  
23 matters, because I think if you accept the pleadings from  
24 Mr. Jones, Mr. Berenson, and perhaps the opportunity for us  
25 to file a short reply brief, that the court will be

1 convinced that we are correct that this controversy is not  
2 properly before it.

3 THE COURT: Thank you, counsel.

4 Mr. Taylor.

5 MR. TAYLOR: Your Honor, currently I represent 8  
6 of the 32 electors of the electoral college from Texas, and  
7 that's a result of the practical consequence of these folks  
8 being sued on the eve of the Thanksgiving break. And my  
9 office, myself included, over the last four days and  
10 continuing on today, has attempted diligently to reach each  
11 and every one of the 32 electors, and thus far we've only  
12 been successful in reaching 25 percent, or 8 of those  
13 folks. And each of them has retained my counsel in this  
14 case, and I can speak on their behalf.

15 But there are 24 others who are yet to have been  
16 notified. I can tell you that to the best of my knowledge  
17 none of the 32 electors, prior to contacts from this office,  
18 knew of the existence of this lawsuit or its filing. And to  
19 the best of my knowledge none of the 32, and certainly not  
20 the 8 that I made contact with, have been given service of  
21 process. So I wanted the record to reflect that.

22 I would urge the court to consider the motion to  
23 dismiss that was filed on behalf of the 8 electors, because  
24 we do not believe this is an Article III case or  
25 controversy. Not arguing the merits of the motion, I simply

1 would say succinctly that we believe this is not only a case  
2 where there's no standing on the part of these three  
3 citizens who filed this lawsuit, but also one in which no  
4 justiciable political -- or rather no justiciable  
5 controversy exists, because it's a political question.

6 And so the court I believe under appropriate case law  
7 would need to confront whether it has jurisdiction or not on  
8 the front end and not alongside any determination of the  
9 preliminary injunction.

10 And, of course, as we see the case and the applicable  
11 statutes, constitutional provisions, and case law, we  
12 believe that the proper decision would be to grant our  
13 motion to dismiss.

14 In the event that the court does not see fit to grant  
15 the motion to dismiss, which it must decide first, then the  
16 court obviously will need to wrestle with the other issues  
17 in the case. And my only practical comment that I would  
18 make, that is contained in our filings of today, is that we  
19 don't have 24 of the 32 electors before Your Honor at this  
20 point. So I would need time to be able to contact them,  
21 confirm that they want representation by the office of  
22 Attorney General, and then file the appropriate papers,  
23 which we will attempt to do forthwith.

24 THE COURT: All right. This is Judge Fitzwater  
25 again.

1           Let me now specify what I'm looking at and give  
2 counsel a chance to respond.

3           In talking about reviewing the merits in tandem with  
4 the motions to dismiss. I do not suggest that I am allowed  
5 to reach the merits despite the motions to dismiss. I  
6 recognize that if the motion to dismiss -- or the motions  
7 are meritorious, that at least generally, if not  
8 specifically, they preclude the court from reaching the  
9 merits.

10          What I am trying to do is get this case in a posture  
11 where regardless of my ruling one side or the other is not  
12 prejudiced in its appeal.

13          In particular, the plaintiffs have already requested,  
14 and I have denied, a request that this case go ahead and go  
15 to the circuit court or to the U.S. Supreme Court. And I am  
16 sensitive to what I said in my order the other day, deciding  
17 this matter expeditiously. And I do not want a party put in  
18 a position where it obtains relief in an appellate court and  
19 it comes back to me. So I hope I am being clear to counsel  
20 when I say that in discussing dual tracks. I am not under  
21 the misimpression that I can reach the merits even if I  
22 grant a motion to dismiss.

23          That said, it seems to me that this case should be  
24 resolved in this court as quickly as possible. I had in  
25 mind a relatively quick due date for the plaintiffs to

1 respond to the motions to dismiss, with no right of reply,  
2 so that I could go ahead and get that resolved.

3 I also had in mind some limited form of discovery, that  
4 I'll discuss in a moment, with quick deadlines for  
5 submitting the materials I talked about under Rule 43(e) in  
6 my November 20 order.

7 It seems to me on the matter of discovery that the  
8 plaintiffs had some basis for seeking a temporary  
9 restraining order, since a temporary restraining order  
10 application requires a verified complaint or supporting  
11 evidence that is admissible. It also appears that much of  
12 the evidence on which they rely is, as one counsel argued,  
13 based on matters of public record. Therefore, it would not  
14 appear that the plaintiffs would need discovery to support  
15 matters of public record.

16 In response however, to the plaintiffs' application, at  
17 least one set of defendants, I think it's Governor's Bush  
18 and Secretary Cheney's in their response, have laid out what  
19 they believe to be evidence that Secretary Cheney is not an  
20 inhabitant of Texas at this time or would not be by December  
21 18. And it could be that the plaintiffs would be entitled  
22 to some limited form of discovery under my dual-track method  
23 to address those matters, such as to have him state under  
24 oath in an interrogatory response that he did put his house  
25 up for sale or that he did obtain a driver's license. I'm



1 just picking these from the list to be illustrative.

2 I believe that given the -- the plaintiffs' desire for  
3 a quick response -- resolution, and certainly the  
4 defendants' desire for a quick resolution of their motion to  
5 dismiss, that we could get this done and I could issue a  
6 ruling by this Friday, if we all worked on this and got it  
7 done.

8 Now, I have some specific thoughts, but I would like to  
9 go back around the horn again and let counsel respond.

10 Mr. Jones.

11 MR. JONES: Well, I guess the response I have, the  
12 need for discovery and the fact that a temporary restraining  
13 order was sought, that discovery isn't needed.

14 If I recall reading the original complaint correctly, a  
15 lot of the allegations in there were made asking the court  
16 to take judicial notice. And once again, I'll just  
17 reiterate that something being a matter of public record in  
18 the newspaper is a jump away from being admissible.

19 I think it's important that when the court does, you  
20 know, reach the decision of whether or not Mr. Cheney is an  
21 inhabitant of Texas, at whatever time the court determines  
22 to be the relevant inquiry, that it do so on as full a  
23 record as possible. Because certainly as this thing moves  
24 up to higher courts, you know, we will have to rely on the  
25 record that was created in this court. And what I would

1 hate to see happen is get to the Fifth Circuit or the  
2 Supreme Court and then have a ruling at one of those courts  
3 that we didn't present sufficient evidence to make a  
4 determination because we were denied the opportunity to  
5 conduct the discovery that would have given us that  
6 information.

7 Beyond -- beyond that, I certainly have no objection to  
8 quick responses to the motion to dismiss and have no  
9 objection to submitting the 43(e) materials as quickly as is  
10 practical given whatever discovery the court allows us. And  
11 I have no objection to considering the motion to dismiss and  
12 the merits in tandem.

13 THE COURT: Ms. Miers.

14 MS. MIERS: Your Honor, if what the court is  
15 suggesting is move forward this week and by Friday have this  
16 in shape for the court to rule, on behalf of my client I  
17 think that is perfectly acceptable.

18 If the court were providing two days for plaintiffs to  
19 respond, I would request a very brief, maybe 24-hour period,  
20 to respond to whatever is filed. I don't relish the thought  
21 of telling my client that I don't get to reply at all. So I  
22 would -- that would put the matter though -- if I am  
23 calculating correctly, if plaintiffs were filing their  
24 papers by Wednesday at 5:00, if we could have until Thursday  
25 at 5:00, then we'll -- would appreciate that opportunity,

1 and then the court would be in a position to rule on the  
2 motion.

3 THE COURT: Mr. Hartmann -- or Mr. Aufhauser.

4 MR. HARTMANN: Mr. Hartmann.

5 Your Honor, let me just say briefly -- and going back  
6 to the question of putting beside the substantial legal  
7 issues that are before you before we get here, but focusing  
8 on the date of December 18, plaintiffs were asked what  
9 discovery they might want. They referred you to the  
10 particulars which are in their complaint. That complaints  
11 are inhabitant/jurisdictional kind of allegations, but they  
12 don't speak as to the only important date that is before  
13 you, which is December the 18th. I think we go through this  
14 discovery and we probably don't add anything to the record  
15 that will be before you in dealing with these weighty  
16 issues. I really don't see why anything along those --  
17 along those lines, in terms of interrogatories, is necessary  
18 to move this case along.

19 I think when we look at the focus on the electoral  
20 college, we see that on the 18th if there's an objection  
21 that it is thrown into the legislative sphere, and the plays  
22 into our view that this is not a proper place for the courts  
23 to be involved in any event. I think there's a very careful  
24 and well \*spelled-out scheme for objecting at that point.

25 David.

1                   MR. AUFHAUSER: Your Honor, this is David  
2 Aufhauser again.

3                   I think Mr. Hartmann said just about everything I  
4 wanted to say.

5                   I -- I want to underscore Ms. Miers' request that if  
6 you put together a briefing schedule that anticipates this  
7 form of discovery that we do have the opportunity to reply,  
8 because I don't know what they're going to assert the  
9 significance of any fact allegedly adduced in discovery is  
10 likely to be. So I would ask the court to give us a mere 24  
11 hours within which to respond.

12                  But I do have to go back to what Mr. Hartmann said,  
13 which is, that it is our conviction that the correct view is  
14 that the question of inhabitancy is a question that focuses  
15 on December 18th. And taking discovery about what  
16 transpired during the last year, five years, or 50 years of  
17 Secretary Cheney's life is an irrelevancy that comes at a  
18 time -- I say this with deepest respect to the court. I  
19 don't want to overstate the issue, but it comes at a time  
20 when his attention is directed to a lot of weighty things,  
21 not the least of which is his health.

22                  And I -- I will, of course, do the court's bidding, as  
23 will the secretary. But I would hate to go back and intrude  
24 upon him on an unnecessary and largely moot exercise if the  
25 court reads the scholarship that we have filed and the

1 papers that opposing counsel filed and make a decision on  
2 that order first.

3 Of course, if the court decides that you do have the  
4 power and you want to go forward, I can represent to the  
5 court if you issued such an order on Monday, early next  
6 week, we'll -- we'll moved you with the modest discovery  
7 you're asking for, because I'll tell the secretary he's  
8 compelled to. But I ask you to reconsider the need for  
9 discovery.

10 THE COURT: This is Judge Fitzwater.

11 Let me first clarify a term I've been using, because I  
12 think counsel may be confused and think I'm going to cut  
13 them off. When I use the word "reply," I meant a reply  
14 brief, a rejoinder of the defendants in support of their  
15 motion to dismiss after the plaintiffs responded. Not that  
16 they would have no right to respond through their own brief  
17 and appendix in opposition to the preliminary injunction  
18 brief and appendix of the plaintiffs. Certainly they would  
19 have that right. I was simply deleting the reply brief  
20 rights that normally exist to remove one more step, and in  
21 the hopes that through my own work and having read your  
22 briefs I could make a prompt decision.

23 With regard to the matter of discovery, let me go back  
24 to Mr. Jones for a minute, or co-counsel, concerning this  
25 dispositive date. I noted that when the plaintiffs filed

1     their amended complaint there is language -- and just, for  
2     example, I'm looking at paragraph 12 on page 4 of the  
3     emergency amended complaint, where the plaintiffs use the  
4     future tense, "will be an inhabitant on December 18."

5             What is the plaintiffs' position whether the  
6     dispositive date is December 18?

7             MR. JONESS: Well, Your Honor, I think that's a  
8     question that the court is going to have to determine in the  
9     course of this, is what is the relevant date.

10            And there are at least three or four dates that could  
11     be relevant to this inquiry. The first is when Mr. Cheney  
12     was selected as Mr. Bush's running mate. The second would  
13     be the date on which he was elected by the convention as  
14     the -- as the vice presidential candidate, which -- at which  
15     point the Texas electors were bound, subject to him winning  
16     the majority in Texas on November 7th, to vote for him. The  
17     third would, of course, be the November 7th, the election  
18     day. And the fourth possible date and only one of four  
19     possible dates, would be December 18th.

20            Our -- our position is that the relevant date has to be  
21     for the -- for the constitutional provision to have any  
22     meaning whatsoever, one of the three earlier dates, and at  
23     the very latest November 7th.

24            THE COURT: And do you have any authority for  
25     that, Mr. Jones?

1           MR. JONES: Well, off of -- right on the tip of my  
2 tongue, no. But I'll leave that to Professor Levinson in  
3 his briefing.

4           THE COURT: Well, Mr. Jones, as you are there now,  
5 has Professor Levinson communicated to you that the  
6 plaintiffs have a good faith belief that it is a date prior  
7 to the date the electoral college meets?

8           And the reason I ask that, Mr. Jones, is --

9           MR. JONES: Sorry. I have not spoken directly to  
10 Professor Levinson about that subject. And I believe that  
11 Mr. McGarry has. And so the information I have about that  
12 legal argument comes through Mr. McGarry.

13          THE COURT: And --

14          MR. JONES: And that's -- but -- but -- if the  
15 question is do I have a good faith belief that we can -- do  
16 I have a belief that we can make a good faith argument  
17 that -- some day other than December 18th, the answer is  
18 yes.

19          THE COURT: The reason I ask is I'm reading the  
20 12th Amendment before me. And if in fact I were to rule  
21 that the operative date is December 18, that might change  
22 what the discovery would be. It might be limited to a few  
23 interrogatories concerning what his intent is, if it hasn't  
24 been that already.

25          MR. JONES: Well, Your Honor, and -- my response

1 to that would be if the issue is his intent on December  
2 18th, where he's going to be an inhabitant on December 18th,  
3 that would require more discovery, not less. And certainly  
4 that would put us in a position perhaps to even have a  
5 hearing, because the credibility of that intent would  
6 certainly be at issue if -- you know, if the court is going  
7 to prejudge that -- that particular issue.

8 MR. AUFHAUSER: Your Honor, this dialogue just  
9 underscores that this is a political controversy in search  
10 of a legal theory. I think you've just heard that the  
11 plaintiffs' counsel is -- would like to be able to say that  
12 the dispositive date is December 18th but doesn't know  
13 whether he can legally say so.

14 MR. BERENSON: Your Honor, Bill Berenson.

15 I've been holding back Mr. Jones. Unfortunately, he is  
16 just very new to this case. It is my understanding from  
17 reviewing case law, Black's Law Dictionary, statutory  
18 authority, both in Wyoming and Texas, really I think a key  
19 question for the court to decide is even if the court  
20 decides that December the 18th is in fact the dispositive  
21 date, my understanding, Your Honor, is to be an inhabitant  
22 is something that you cannot become overnight, or even in  
23 two or three weeks or even in a couple of months.

24 In fact, I believe, if I remember from memory, that  
25 Black's uses the usual and permanent definition. In other



1 words, residency in Wyoming is a minimum, just to be a  
2 resident, Your Honor, of one year. And many statutes in  
3 Wyoming, I've briefed this, sir, state that not only have  
4 you been living continuously in Wyoming for that one year  
5 but you have not also resided in another state, for example,  
6 Texas, during that year.

7 So without arguing the case, Your Honor, I think that  
8 even if the court decides that December 18th is in fact the  
9 date, I don't think that at the last second the 12th  
10 Amendment has in mind that Thomas Jefferson could have had a  
11 Virginia vice president and then the vice president could  
12 have moved up to Massachusetts overnight. I don't think  
13 that's what the founding fathers had in mind.

14 And I think that if the court allows us a reasonable  
15 amount of discovery, including -- we would like a  
16 deposition, but we certainly understand the efficiencies  
17 here. Certainly reasonable amounts of interrogatories and  
18 document productions, we think that we can show Your  
19 Honor -- again, I apologize for overarguing the case --  
20 that a lot of this is simply too little too late to legally  
21 become a "inhabitant" as that term is used in the 12th  
22 Amendment.

23 THE COURT: Mr. Berenson, since you have some  
24 ability to address this more specifically than does Mr.  
25 Jones due to his late entry in the case, let me ask you.

1           In your emergency amended complaint you have several  
2 paragraphs -- and I'm referring now to paragraph 13 and its  
3 subparts, and apparently there are some other paragraphs,  
4 such as paragraphs 16, 17, and 18, and 19, that appear to be  
5 based on specific factual allegations that you believe are  
6 sufficient to entitle you to a preliminary injunction.

7           And perhaps you could answer for me what discovery it  
8 is that you feel you need.

9           MR. BERENSON: Okay. Your Honor, I'm not sure if  
10 I caught all those paragraphs, but I think I --

11          THE COURT: Let me give you an example, Mr.  
12 Berenson.

13          MR. BERENSON: Okay.

14          THE COURT: You rely on the allegation that he has  
15 inhabited in Highland Park, that he filed homestead  
16 exemptions for several years, he paid certain real estate  
17 taxes and the like.

18          MR. BERENSON: Yes, sir.

19          THE COURT: You also talk about his driver's  
20 license, automobile registration, address in annual reports,  
21 physician treatments, and banking, and the like.

22          MR. BERENSON: Oh, I see.

23          THE COURT: So what I'm wondering is do you really  
24 need any additional discovery, provided that your evidence  
25 is admissible?

1           I mean, I agree with what Mr. Jones said a moment ago  
2 when he said the fact that something is in a newspaper  
3 doesn't make it admissible.

4           MR. BERENSON: Correct. We do I think  
5 unfortunately run into some severe hearsay problems in terms  
6 of building a record for these higher appellate courts. And  
7 I do think, Your Honor, that under the circumstances -- and  
8 certainly I mean no disrespect at all to the defendants. I  
9 hold them in high regard. I feel like, back to the purpose  
10 of the 12th Amendment, if you know the -- of course, Your  
11 Honor, you're a scholar and you understand what happened in  
12 the election of 1800 and the whole reason for needing the  
13 12th Amendment in terms of the exact time between Jefferson  
14 and Burr.

15           I don't think that these founding fathers, as brilliant  
16 as Thomas Jefferson was, had in mind a last-minute  
17 shenanigans where someone could start discarding baggage  
18 just at the last minute. And if we could have sufficient  
19 discovery, we think we could show that is exactly what  
20 happened.

21           The Highland Park home, we have on authority, but  
22 perhaps not in admissible form, was only listed for sale  
23 last week. Only last I think November the 16th, Your  
24 Honor. It is listed as owner occupied, we have it on  
25 belief. Secretary Cheney is living there.

1           So if he states in his interrogatories simply, what, I  
2   intend to move to Wyoming, and then he's elected vice  
3   president, we know he's going to live in Washington, D.C.  
4   We know that he's going to immediately change his Wyoming  
5   driver's license to D.C., his voting to D.C. or Virginia. I  
6   don't want to use the word "sham," but I don't think that he  
7   can legally qualify as a resident. I think he is an  
8   inhabitant of Texas. You can't just change your spots.

9           MR. AUFHAUSER: I think we're getting off to the  
10   merits, but forgive me, Your Honor. I do want to respond to  
11   that. Whatever may have been true in 1800 in terms of lack  
12   of mobility and the rapidity with which each of us have  
13   changed addresses from schools and college to various  
14   marriages and jobs and where we practice law, differences  
15   between the year 1800 and 2000 is more than two centuries  
16   it's light years. And the functional definition of  
17   inhabitancy would have to be looked at in light of today.  
18   And more importantly, it has to be looked at in the light of  
19   what state is he an inhabitant of on December 18th when the  
20   electoral college meets. And on that question there is no  
21   discovery, because that is the future. It is not history.  
22   And discovery focuses on history.

23           THE COURT: This is Judge Fitzwater.

24           I'm wondering if in light of what the plaintiffs are  
25   requesting that the court could allow a limited number of

1 requests for admission, where the plaintiffs would set out  
2 these matters, such as requests that Secretary Cheney admit  
3 or deny a certain fact, and see if we can't deal with it  
4 that way. And that's why, Mr. Berenson, I'm asking the type  
5 discovery you think you need.

6 MR. BERENSON: Yes, sir. I had prepared a list of  
7 interrogatories. May I read --

8 THE COURT: How many are there, by the way?

9 MR. BERENSON: Well, I had 25.

10 THE COURT: Okay. Why don't you give me an  
11 illustration.

12 MR. BERENSON: Okay. For example, did he list his  
13 Texas home for sale on November 16th. I mean, that's -- you  
14 know, we don't know that for a fact. We think that's  
15 correct.

16 State the date that Mr. Cheney abandoned his Texas  
17 home.

18 I don't want to give away our entire trial strategy,  
19 Your Honor, but I mean, I think the court -- you know, did  
20 he claim his 2000 Texas homestead exemption.

21 THE COURT: All right. Thank you.

22 MR. BERENSON: Yes, sir.

23 THE COURT: Mr. Hartmann, I'll call upon you or  
24 Mr. Aufhauser, since you represent Secretary Cheney.

25 Again, reiterating that I understand the motions to

1 dismiss need to be addressed first, but hoping to get the  
2 whole thing wrapped up, is it possible that your client  
3 could respond to requests for admission, or no more than a  
4 certain number of interrogatories, and do it very quickly,  
5 really at the same time the briefing is going on with the  
6 motion to dismiss, so I can get this all wrapped up at  
7 once?

8 MR. HARTMANN: Your Honor, I may say we certainly  
9 can. We still are groping with the question, however, of  
10 how -- how on earth some of these questions can relate to  
11 what we believe is very clear under the law, and that is an  
12 inquiry that will have to be made on the 18th of December.

13 But clearly, if the court requires us to respond in a  
14 limited fashion, we would just request that it be very  
15 narrowly tailored. And certainly we would be willing to do  
16 that.

17 MR. AUFHAUSER: I do want to add, however, I'm not  
18 waiving the right to object to what's asked.

19 THE COURT: Well, you're not. And one way to  
20 handle that would be either to allow you to object when you  
21 get them or for the court to step in prospectively and just  
22 rule on what would be answered, so we could shorten that.

23 MR. AUFHAUSER: I tell you what. This is Robin's  
24 suggestion, as we caucus a little bit here at the table. I  
25 wonder if the court today will refrain from ordering

1 discovery with the following representation by me and Haynes  
2 & Boone -- This is David Aufhauser again speaking -- that we  
3 attempt during the next 24 hours to agree on a stipulation  
4 of facts with plaintiffs' counsel. If we fail to, we advise  
5 the court by tomorrow at 5:00 p.m., or 9:00 a.m. Wednesday  
6 morning, and the court can do what it sees fit.

7 But I would respectfully ask the court not to order  
8 discovery pending the motion to dismiss.

9 MR. BERENSON: Your Honor, Bill Berenson.

10 May I quickly respond to that?

11 THE COURT: You may.

12 MR. BERENSON: With all due respect, I believe  
13 that to be an idea, but having read the briefs that were  
14 filed by defendants, I'm not so sure where that's going to  
15 lead. Having been on this case myself only for, you know, a  
16 week or two, I'm not going to -- I really feel like there is  
17 a need for the plaintiffs to have discovery, Your Honor,  
18 and I really appreciate what the court is doing here.

19 I think that we have to have it, Your Honor. There  
20 will be no record. I don't think the defendants are going  
21 to stipulate to the kinds of things that they -- that the  
22 plaintiff is going to be asking.

23 MS. MIERS: Your Honor, may I speak?

24 This is Harriet Miers.

25 On behalf of my client, we are in a time crunch here

1     for one reason and one reason only, and that is that this  
2     matter, although discussed in the media for a very long  
3     time, is just now being brought before the court. And we  
4     would respectfully request that the court bifurcate the  
5     motions from hearing the preliminary injunction, given what  
6     is clearly going to be subject to serious debate in terms of  
7     scope of discovery. And I know on behalf of my client, and  
8     it has already been said on behalf of Secretary Cheney, we  
9     will respond to anything else that the court feels needs to  
10    be responded to on a quick basis.

11           But if the motions could be ruled upon by Friday of  
12    this week and then we proceed the beginning of next week, if  
13    there is any basis for doing so, I respectfully suggest that  
14    that is a mechanism for an orderly disposition without what  
15    is clearly going to be contentious.

16           THE COURT: Mr. Jones.

17           MR. JONES: Your Honor, obviously I disagree with  
18    that wholeheartedly. The only thing it is a mechanism for  
19    is delay.

20           THE COURT: Well, Mr. Jones, let me start with the  
21    motion to dismiss and then I'll go back to the application.

22           Could you-all get in your response to the motion to  
23    dismiss by 4:30 on Wednesday?

24           MR. JONES: Yes.

25           THE COURT: And by get it in, I mean you would



1 file it -- and I will allow for this purpose filing by fax,  
2 to give more time to finish -- and serving on the opponent  
3 by fax by 4:30 Wednesday the 29th.

4 MR. JONES: Okay.

5 THE COURT: And as of this point, I'm not inclined  
6 to allow the defendants to file reply briefs in support of  
7 their motions to dismiss, so that I can shorten the time.

8 Now, let me go back for a moment to the business of the  
9 applications.

10 One way that I could proceed with the applications on  
11 what I call merits, meaning the preliminary injunction,  
12 would be to require that the plaintiffs have their brief and  
13 their appendix that has their materials on it on file at  
14 Wednesday the 29th, at the same time they submit their  
15 response to the motion to dismiss, and then allow the  
16 defendants to file their own response by 4:30 on Thursday,  
17 the 30th, with their brief and any appendix materials they  
18 want, with the idea being to get a ruling out on the motions  
19 to dismiss, and/or if necessary the merits, by Friday, the  
20 1st, which then allows a period of 17 calendar days, and  
21 fewer business days, to litigate in the circuit court and  
22 the Supreme Court.

23 In order to do that, and I'm going really back to the  
24 plaintiffs' desire expressed repeatedly for a quick ruling,  
25 it would be necessary that the plaintiffs get their brief

1 and appendix on the merits on file.

2 In that connection, I'm willing during this conference  
3 to hear Mr. Berenson's interrogatories and hear any  
4 objections and rule on what would be a permissible  
5 interrogatory, with the idea being that we would submit some  
6 time tomorrow for those interrogatory responses to be  
7 transmitted to Mr. Jones and Mr. Berenson.

8 Now, I'm not sure to whom I should turn first.

9 MR. JONES: Well, Your Honor, I would ask -- you  
10 know, now that I'm coming into this case, in the sense I've  
11 not even had the chance to look at those interrogatories,  
12 and I would certainly want to have input into those. So I  
13 would ask that we not proceed in that manner.

14 And I think, again, I'd make the request that we be  
15 given the opportunity to have some combination -- I think  
16 the court's idea of request for admissions was good -- but  
17 some combination of requests for admissions,  
18 interrogatories, and some documentary evidence as well.

19 THE COURT: Mr. Berenson, I know --

20 MR. JONES: I'm willing to serve those, you know,  
21 first thing -- you know, work through the night and have  
22 those ready first thing in the morning. But I would  
23 certainly ask that I and Mr. Levinson have some input into  
24 those.

25 THE COURT: Let me go back, if I might, to Mr.

1 Hartmann or Mr. Aufhauser.

2 Do you know what your ability would be to respond to  
3 request for admission or interrogatories by the end of  
4 tomorrow?

5 In other words, what -- if I allow fax -- if I allow  
6 you to fax your responses to plaintiffs' counsel, and if I  
7 allow the faxing to be a substitute for actual signatures  
8 and the like, do you even know the availability of your  
9 client to respond that quickly?

10 MR. AUFHAUSER: This is Mr. Aufhauser.

11 The short answer is no, I don't. I can certainly find  
12 out and promptly tell the court. But, you know, it depends  
13 on whether GSA gives him the case of a transition office or  
14 not.

15 MR. HARTMANN: Your Honor, if I could interject.  
16 This is Rob Hartmann again. We got away from an earlier  
17 submission that we accept a stipulation. Plaintiffs'  
18 counsel was not enamored with that notion, but I don't know  
19 why we could not pursue that. If they could draft up what,  
20 you know, they believe the facts will show, instead of  
21 sending interrogatories, I don't know why we couldn't take a  
22 look at that.

23 You know, from what they have listed in the complaint  
24 there may be most of it that we can deal with in a  
25 stipulation and save all of us --

1           MR. AUFHAUSER: We would proffer stipulated facts  
2 as well.

3           MR. BERENSON: Your Honor, Bill Berenson again. I  
4 appreciate the effort. I respectfully disagree. I --  
5 having read the motions, the briefs, frankly, I was shocked  
6 by some of the things I read that the defendants are  
7 alleging and arguing. And I think that may waste critical  
8 time.

9           THE COURT: Well, let me ask either Mr. Berenson  
10 or Mr. Jones, are you willing to defer your briefing on the  
11 merits until after the court rules on the motions to  
12 dismiss?

13           I'm really trying to get this whole thing wrapped up so  
14 that you have everything before the appellate court.

15           MR. JONES: I understand that. I appreciate that,  
16 Your Honor. No, we're not willing to defer that, because I  
17 think that is simply a mechanism for delay and that -- like  
18 I said, we can have our requests for admissions,  
19 interrogatories and document requests ready to fax to them  
20 first thing in the morning.

21           MR. AUFHAUSER: I'm sorry, are you through?

22           THE COURT: Go ahead, Mr. Aufhauser.

23           MR. AUFHAUSER: I must say I keep hearing the  
24 mantra this is a mechanism for delay. It is not. This is  
25 the orthodoxy we are petitioning the court to follow. We

1 have good faith, strong arguments that they have no earthly  
2 right to take discovery in your court. I say that  
3 respectfully.

4 I appreciate the very creative suggestion you're making  
5 to try to wrap it up in one bundle so it can be before --  
6 both matters, merits or otherwise, could be before the court  
7 promptly. We are not the reason for delay. It's something  
8 Ms. Miers said to the court, and I want to underscore. If  
9 there is any reason for delay it is that of the  
10 petitioner's. Frankly, to me, if I have to go back to  
11 Secretary Cheney and say even though they don't have the  
12 right to take discovery from you, even though you have an  
13 extraordinarily strong argument, you are required to answer  
14 these questions under oath -- and the last thing is -- I  
15 find it curious that the plaintiffs did not accept the  
16 court's invitation to rehearse the interrogatories over the  
17 phone right now, if that's the case. He would respectfully  
18 like to consult with his colleagues. Again, the delay is  
19 his making, not ours.

20 MR. TAYLOR: Andy Taylor. Your Honor, if I may  
21 make a comment for the 8 electors that I represent.

22 THE COURT: Please go ahead.

23 MR. TAYLOR: Certainly it would not be  
24 characterized as delay, and certainly it would be in the  
25 plaintiffs' best interest to get all of the parties against

1     whom he seeks injunctive relief truly in front of the court,  
2     so that whatever remedy this court fashions can be a remedy  
3     that would apply to all 32 electors.

4             And I would certainly represent to Your Honor on the  
5     record now that I will do my utmost to contact and be  
6     retained by the remaining 24 electors so that in the 24-hour  
7     period while the parties are trying to reach a stipulation I  
8     can get all of the other electors before the court.

9             And I think that would be in all of the parties' best  
10    interests, no matter how the court rules.

11            MR. JONES: Your Honor, if I may -- this is James  
12    Jones again.

13            As long as the electors are before the court by the  
14    time the court issues its injunction, if any, that -- that  
15    is sufficient. And I don't think that delaying discovery,  
16    which seems to be the universal theme I'm hearing from the  
17    other side, would do anything except delay discovery. It  
18    certainly should not delay a discovery from Mr. Cheney who  
19    is now before this court.

20            MS. MIERS: Your Honor, if I might, these -- I  
21    don't think it is beyond everyone's experience on this phone  
22    call that there are lots of people who would like to take  
23    depositions of my client. I've been down that road before.  
24    Secretary Cheney, any other number of high-level,  
25    prominent, media-watched people.

1           And the idea that someone can file a piece of paper in  
2 court, and even though jurisdiction is lacking, that  
3 discovery would be allowed, is a very significant policy  
4 issue. And that's what's occurring here. Because these  
5 motions that have been filed on behalf of our clients are  
6 solid and good, and they ought to be granted.

7           And for the plaintiffs, on the basis of a pleading that  
8 they file, the court gives them every right to file a  
9 response on their injunction and they haven't even yet done  
10 that as we speak today. They change -- or add counsel, and  
11 that's suddenly a reason for delay. And yet the  
12 disadvantage is visited on us, because expedited discovery  
13 is ordered, is pending the ruling on the motion.

14           And on behalf of my client I would request disposition  
15 of the motions that we believe are dispositive before  
16 discovery proceeds in this matter.

17           MR. TAYLOR: Andy Taylor for the state electors.

18           We certainly endorse that view. We, in our pleadings or  
19 papers filed today with the court, state that this lawsuit  
20 is an attempt to run government by injunction. Because what  
21 they're trying to do is to get an order from Your Honor that  
22 would prohibit the State of Texas from casting its 32  
23 electoral votes and exclude it from participating in the  
24 election of the president and vice president of the United  
25 States, and yet they don't even want all of the electors to

1 be before Your Honor before they try to accomplish and  
2 fashion such a claim for relief.

3 If you look at the amended complaint, there is no  
4 mention of service information. It lists the 32 electors by  
5 name and then the cities that they're from, but with no  
6 address information. And also, counsel, correct me, to the  
7 best of my knowledge no attempt on their part has been made  
8 to issue service of process on any of them.

9 And so it seems to me odd that at base level this would  
10 be a request for injunctive relief against parties who are  
11 not before the court. And certainly there should be an  
12 opportunity to get everybody in front of the court. That  
13 would not in any way, while I'm attempting to round  
14 everybody up, put a hurdle in front of Your Honor to grant  
15 the motions to dismiss. Because the court is fully  
16 empowered to grant those motions to dismiss, despite the  
17 fact that not all parties are present.

18 But we would need everyone present before the court  
19 could grant any requests for discovery or expedited matters,  
20 because it affects the necessary parties that would have to  
21 be part of this litigation.

22 THE COURT: This is the court. Let me go back to  
23 Mr. Aufhauser or Mr. Hartmann.

24 The court is sensitive to the issue of discovery in a  
25 case such as this. I'm wondering if in considering the



1 practical aspects of this case you prefer getting whatever  
2 discovery is allowed over with tomorrow or the next day,  
3 versus the possibility that I grant the motion to dismiss,  
4 it's reversed, and then we're looking at something on the  
5 merits even closer to December 18. And that's part of what  
6 the court's examining.

7 MR. HARTMANN: Your Honor, Rob Hartmann. Let me  
8 just say a couple of things briefly.

9 It would be our preference that we go forward with no  
10 discovery.

11 I truly believe that the parties before you that raise  
12 the legal issues that are now extant, don't require  
13 discovery for -- you know, for treatment. And by going  
14 forward with any kind of discovery and attempting to put  
15 this whole thing in a package, you're really only  
16 capturing -- I'm not sure we're capturing anything  
17 additional that would be helpful to the appellate court.

18 I mean, to me it makes more sense to address these  
19 substantive issues that are currently before you.

20 Now, having said that, I -- I've got a little bit of an  
21 alarm that's gone off in my mind in listening to this  
22 colloquy. And that is because I've looked at some of these  
23 particulars that the plaintiffs have in their papers, I  
24 listened to you ask the plaintiffs for some illustrations on  
25 interrogatories that they would propose.

1           I think they listed three. I thought all of those  
2 probably were properly the subject of some kind of a  
3 stipulation. And frankly, you know, it's something we do  
4 all the time. I did not see why we couldn't dispose of the  
5 issues that way. The plaintiffs are resistant to that. I'm  
6 becoming a little concerned that they have in mind more  
7 wide-ranging discovery than I am thinking about right now,  
8 or discovery of a different kind. I don't know why they  
9 would resist this, because it seems to me an easier course  
10 to work with us to stipulate as to these facts.

11           MR. AUFHAUSER: This is David Aufhauser. I again  
12 endorse what my co-counsel has just said.

13           The short answer to your question is the latter not the  
14 former. That is, the question of whether or not this court  
15 has power to hear this question and whether or not these  
16 plaintiffs have a right to prosecute the action is the  
17 question that should be decided immediately and the question  
18 that should be presented to the Fifth Circuit.

19           And if -- I'm confident we never have to reach the  
20 question of discovery of these factual issues because it's  
21 not before the court properly. They do not -- our assertion  
22 is simple. They are not the proper parties to bring this  
23 action and this is not the right place to bring the  
24 complaint. And because of that, respectfully, the court  
25 doesn't have the power to order discovery.

1           THE COURT: All right. Does anyone else want to  
2 be heard?

3           MR. JONES: Your Honor, I -- James Jones.

4           I would just note that in every injunctive case that  
5 comes before you in which expedited discovery is ordered,  
6 that discovery is ordered and takes place prior to, you  
7 know, rulings on motions to dismiss such as this that are  
8 filed.

9           I understand they think a lot of their motions. We  
10 don't think as much of them. We think this court does have  
11 power to hear this case. We think this is the proper place  
12 to bring this case. And I don't believe that the court  
13 should be joining in this effort -- not -- what is an  
14 obvious effort simply to delay this case so that they  
15 basically -- the defendants can win this case by delay. All  
16 they have to do is delay a ruling on the merits beyond  
17 December 18th and they have won this case not on the merits  
18 but simply by delay.

19          And -- and I think that if the court is not going to  
20 allow us to take the depositions, to allow us, you know,  
21 requests for admissions, interrogatories, document requests,  
22 like I said, we can have those to you first thing in the  
23 morning, and -- I don't know what it is Mr. Hartmann is  
24 worried about, in terms of far-ranging discovery. The  
25 discovery will be tailored to the issue of where Mr. Cheney

1 is an inhabitant, which is the issue that is before this  
2 court.

3 Get this thing wrapped up.

4 MS. MIERS: Your Honor, Harriet Miers.

5 May I respond?

6 THE COURT: You may.

7 MS. MIERS: With all due respect to counsel, I  
8 believe he misstates the law.

9 With respect to motions to dismiss of the sort that  
10 have been filed in this matter, that question standing of  
11 plaintiff and subject matter jurisdiction, discovery is not  
12 only not routinely allowed, it's not allowed at all,  
13 because, as earlier referenced, the whole issue of whether  
14 there is a court that can hear disputes about that discovery  
15 is at question until those motions are ruled upon.

16 With respect to the preliminary injunction request,  
17 even that is discretionary, as I think all counsel on this  
18 phone call know.

19 If in fact discovery were to be issued in this case in  
20 the ordinary course, and in order to protect my client, I  
21 assume counsel's ability to protect their client, I would  
22 want the opportunity to respond to that discovery request,  
23 just like in any matter, so that if discovery is requested  
24 prematurely, as it is being requested here, I could object  
25 to it. If it is discovery not of the sort that ought to be

1 had, I could object to it.

2 It is for all these reasons that we respectfully  
3 request that the motions that are before the court that are  
4 dispositive be ruled upon before discovery proceeds, and  
5 depending on the resolution of those motions that we do next  
6 whatever needs to be done.

7 And all counsel are saying, at least on this side of  
8 the table, we're going to act promptly to respond to the  
9 court's handling of the matter every step of the way. And  
10 we're doing that I think under extraordinary circumstances,  
11 where the delay and urgency is created by the plaintiff.

12 THE COURT: All right. This is Judge Fitzwater  
13 speaking.

14 This is the ruling of the court concerning our  
15 procedure.

16 First, I'm not going to consolidate the preliminary  
17 injunction application with trial on the merits. There is  
18 no time to do that, and that procedure contemplates that the  
19 parties can be fully prepared for trial, albeit on an  
20 expedited basis, and we don't have the time between now and  
21 December 18 to do that.

22 Second, while recognizing that the motions to dismiss  
23 are to be decided prior to reaching the merits, I believe  
24 it's in the best interest of the parties and the country to  
25 have this case resolved promptly in this court. And so I'm

1 going to allow some limited discovery will and brief -- and  
2 requiring briefing on the merits on a dual track with the  
3 briefing on the motions to dismiss.

4 By 9:00 o'clock a.m. Dallas time, on November 28, by  
5 that time, the plaintiff -- plaintiffs must have faxed or  
6 otherwise provided to counsel for Secretary Cheney a  
7 combination of 25 of the following: Interrogatories;  
8 requests for admission; or stipulations of fact.

9 Discovery may only be sought from Secretary Cheney, not  
10 from Governor Bush or the elector defendants.

11 Those 25 discovery requests can all be interrogatories  
12 or they can all be requests for admissions or they can all  
13 be proposed stipulations, but the combination must not  
14 exceed 25. And interrogatories are limited to the actual  
15 interrogatory, with no subparts.

16 If Secretary Cheney's counsel and plaintiffs' counsel  
17 cannot work out any objections, I will be available at 11:00  
18 o'clock tomorrow for a conference call to rule on any  
19 objections.

20 Now, in a moment I'm going to hear from counsel before  
21 I set the deadline finally for responding to whatever  
22 discovery I allow. But the presumptive deadline in my mind,  
23 so that the rest of what I'm about to say makes sense, would  
24 be that Secretary Cheney's responses are faxed to  
25 plaintiffs' counsel, to whatever discovery I allow, by 9:00

1 o'clock Dallas time, November 29.

2 Then at 4:30, November 29, the plaintiffs would be  
3 required to file their brief in opposition to the motions to  
4 dismiss, their brief in support of their preliminary  
5 injunction application, and their appendix of evidence.

6 By "file" I mean it is permissible to fax it to the  
7 court and to fax opposing counsels' copies to them.

8 And then the defendants would have until 4:30 on  
9 November 30, to file, and by that I mean fax to the court,  
10 their brief on opposition to the merits and any appendix  
11 that they wish to file.

12 And no reply brief in support of the motion to dismiss  
13 would be permitted. And no reply brief in support of the  
14 preliminary injunction application would be permitted. And  
15 the court would decide the motions to dismiss and if  
16 applicable reach the merits by sometime in the afternoon of  
17 December 1st.

18 Now let me turn if I might to Mr. Hartmann.

19 Understanding you're not waiving any objection to  
20 anything, what's your position on whether if I make a ruling  
21 by 11:00 o'clock tomorrow on any disputed discovery you  
22 could have your responses faxed by the next morning at 9:00  
23 o'clock?

24 MR. HARTMANN: Your Honor, I really should defer  
25 to Mr. Aufhauser on that.

1           My reaction is 9:00 to 11:00 would be a little bit  
2 short. I would suggest at least until after lunch.

3           You think, David?

4           MR. AUFHAUSER: Yes. Your Honor, I simply don't  
5 know what Secretary Cheney is doing tomorrow between 9:00  
6 and 11:00 o'clock Dallas time. He may be in flight. He may  
7 be engaged in affairs of state. I just don't know.

8           So I respectfully ask that we push back that objection  
9 period some period of time, some number of hours tomorrow.

10          THE COURT: I'm not sure what your schedule is  
11 tomorrow. I am required to be in New Orleans on Wednesday  
12 for judicial business and am going to be flying there myself  
13 tomorrow afternoon. I will be reachable at some point, but  
14 not in flight.

15          My hope as well was that by having a shorter period  
16 that would give you more time to prepare your responses.

17          I would be willing to do the following, to have counsel  
18 advise me at 11:00 a.m. of any need for additional time,  
19 including the need to contact Secretary Cheney and any  
20 proposal for when they would want to have the conference.  
21 Obviously, the delay in that ruling affects the defendants  
22 more than it affects the plaintiffs, so if the defendants  
23 are making that request I don't necessarily have a problem  
24 with it.

25          MR. HARTMANN: That's a good solution. We'll



1     advise you of 11:00 whether or not I can keep to the  
2     schedule of 11:00.

3             THE COURT: All right. Now, without requesting  
4     motions for rehearing at this point, do counsel have  
5     questions of the court concerning my ruling?

6             Mr. Jones?

7             MR. JONES: None from the plaintiffs, Your Honor.

8             THE COURT: Ms. Miers?

9             MS. MIERS: Not at this time.

10            THE COURT: Mr. Aufhauser or Mr. Hartmann?

11            MR. AUFHAUSER: If I understand the way you framed  
12     it, not at this time. But we do respectfully observe the  
13     right to object to the order before discovery.

14            THE COURT: That's fine. I understand that.

15            MR. HARTMANN: Your Honor, when we speak tomorrow  
16     at 11:00, we may need to address the rest of the schedule  
17     depending on the secretary's availability and our ability to  
18     get the information requested.

19            MS. MIERS: If I'm understanding the court's  
20     ruling, in spite of the fact that none of us have our  
21     clients present, we are reserving -- we are not waiving our  
22     right to object to the rulings of the court?

23            THE COURT: Well, you're not. But, Ms. Miers, as  
24     far as I see your client, whom I understand is Governor  
25     Bush, there really is nothing different from what you

1 originally requested. No discovery is allowed of him  
2 personally, and all I've really done is taken away from you  
3 your right to file a reply in support of your motion to  
4 dismiss. I'm not sure what you would be objecting to,  
5 really.

6 MS. MIERS: Well, Your Honor, we're required to  
7 participate in discovery, and it affects my client's rights  
8 and it's just a matter that I have to reserve the right to  
9 talk to my client about and make a determination thereafter.

10 As I indicated previously, having to participate in  
11 discovery on the record in this case creates the significant  
12 policy concern for us. And I'm not saying that we will take  
13 any action, but I have to reserve the right to discuss that  
14 issue with my client.

15 THE COURT: That's fair enough.

16 I really meant by my question, I really was asking, and  
17 not rhetorically arguing, whether or not there was any  
18 prejudice. But I understand everyone reserves the right to  
19 object.

20 MR. TAYLOR: Two questions. The phone counsel at  
21 11:00 o'clock are all counsel of record supposed to be part  
22 of that call?

23 THE COURT: You are welcome. I really had in mind  
24 plaintiffs' counsel and Secretary Cheney's counsel. These  
25 requests would only be directed to him. But I don't intend

1 to deprive anyone of the right to participate.

2 MR. TAYLOR: I wanted to make sure I understood  
3 the court's intention. And then secondly, is this order  
4 something that is going to be transcribed and circulated?

5 THE COURT: The order that I issue will be in  
6 writing. I will not circulate it as agreement to form. But  
7 I believe everything we've been doing has been posted on our  
8 web site. And you might even get a copy more quickly there  
9 than you would from me. However, I'm glad to have a member  
10 of my staff fax you a copy of the order.

11 MR. TAYLOR: I'm talking about the order preceding  
12 you've just outlined.

13 THE COURT: That's what I'm referring to.

14 MR. TAYLOR: Those are my only two questions.

15 MS. MIERS: Just for the record. Harriet Miers.  
16 I would like to participate in any conference that's  
17 held in the matter.

18 THE COURT: All right. That's fine.

19 Whoever is the initiating attorney at 11:00 o'clock,  
20 and I would assume it would be the objecting attorney, if  
21 you'll make certain that Ms. Miers is able to be on the  
22 phone.

23 MR. TAYLOR: I would request the same, for Andy  
24 Taylor.

25 THE COURT: All right. That's fine.

1 MR. BERENSON: Your Honor, Bill Berenson.

2 First, I want to thank you for your -- your  
3 cooperation, the wonderful way the court has expedited the  
4 discovery. I genuinely appreciate that. I'm sure all  
5 counsel do.

6 But since nobody seems to be -- of course, given the  
7 craziness of the last week, and Secretary Cheney's schedule  
8 and his unfortunate health problems, I don't mean to be  
9 negative, but I would like to think quickly in terms of a  
10 back-up of what if tomorrow at 11:00 he is not available  
11 for -- you know, you're going out of town Wednesday. Do I  
12 understand that you're going to be in New Orleans? I'm  
13 curious. This could delay us into Thursday, Friday.

14 Is there an alternative back-up plan we could quickly  
15 envision?

16 THE COURT: This is the court. It would be my  
17 intention to change the schedule just ever so slightly so  
18 that this could be accomplished quickly.

19 Again, and somewhat addressing the issues that have  
20 been raised about the importance and the other public policy  
21 issues, it's the court's impression that it benefits all  
22 parties for this to be resolved quickly. And so my intent,  
23 Mr. Berenson, would be if this can't be done, to do it  
24 quickly still.

25 MR. BERENSON: Yes, sir.

1                   MR. AUFHAUSER: This is David Aufhauser. Thank  
2 you for letting me participate. And if it's doable, I would  
3 request of the court reporter for an expedited copy of the  
4 transcript of this hearing.

5                   THE COURT: You may.

6                   And do you want her just to state on the telephone her  
7 phone number or allow to contact her?

8                   All right. There being nothing further, that's the  
9 conclusion of the conference.

10                  Thank you.

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C E R T I F I C A T I O N

I, PAMELA J. WILSON, CSR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This the 27th day of November, 2000.

A handwritten signature in cursive script, appearing to read 'Pamela J. Wilson', is written over a horizontal line.

PAMELA J. WILSON, CSR  
Official Court Reporter  
The Northern District of Texas  
Dallas Division